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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 219

INEZ L. BURNS, MABEL SPAULDING, MYRTLE RAMSAY, JOSEPH HOFF and MUSETTE BRIGGS,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, First District,
State of California,
and
BRIEF IN SUPPORT THEREOF.

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THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, First District, State of California.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Inez L. Burns, Mabel Spaulding, Myrtle Ramsay, Joseph Hoff and Musette Briggs hereby petition for a Writ of Certiorari to the District Court of Appeal,

First District, State of California, on the ground that each of their convictions, in the Superior Court of the State of California, in and for the City and County of San Francisco, of two felonies, to-wit: Conspiracy to commit abortions, and conspiracy to violate Section 2141 of the Business and Professions Code of the State of California, is null and void for want of the essential elements of due process of law in violation of the 14th Amendment to the Constitution of the United States in that each of said petitioners aforesaid was denied his right not to be put in jeopardy twice for the same offense.

Petitioners, and each of them, timely entered their plea of double jeopardy in the trial Court below, and timely moved the aforesaid Superior Court for their discharge from custody on the constitutional grounds asserted here.

These motions were denied, and upon conviction of the petitioners thereafter, the question of double jeopardy, including the lower Court's violation of the 14th Amendment to the Constitution of the United States was presented to and argued before the District Court of Appeal, First District, State of California, and that Court, without mentioning or passing upon defendants' rights and privileges under said 14th Amendment to the Constitution of the United States, affirmed the conviction aforesaid, merely holding that petitioners' rights under the Constitution of California, which provides that no person shall be put in jeopardy twice for the same offense, were not violated. This opinion was filed on February 25, 1948.

Thereafter, petitioners requested a hearing before the Supreme Court of the State of California on the grounds that their said rights under the Federal and State Constitutions were violated, and the hearing was denied on March 25, 1948. Whereupon remittitur issued out of the aforesaid District Court of Appeal to the Superior Court below, on March 27, 1948.

On the 7th day of June, 1948, this Honorable Court extended the time within which these petitioners could petition this Court for a writ of certiorari up to and including the 24th day of July, 1948. (R. 619.) Thereafter and on the 16th day of July, 1948, this Honorable Court again extended petitioners' time within which to file a petition for a writ of certiorari up to and including the 23rd day of August, 1948. (R. 620.)

Petitioners have now exhausted all of their rights for appeal or review in the Courts of California.

STATEMENT OF THE CASE.

Petitioners were informed against on December 17, 1945, by the District Attorney of San Francisco, California, for conspiring together to commit the crime of abortion, denounced by Section 274 of the Penal Code of California, and for conspiring together to violate Section 2141 of the Business and Professions Code of the State of California (practicing medicine without a license). (R. 1-4.)

The chronology of the material facts is as follows:

Upon the filing of the information and the assignment of the cause to Department No. 12 of the Superior Court, aforesaid, Honorable William F. Traverso presiding (R. 4), the petitioners were thereafter arraigned and entered their plea of not guilty. (R. 4-6.) Thereupon a jury was selected to try the cause and this jury disagreed and was thereafter dismissed. (R. 6.)

Subsequently petitioners were again tried by another jury before the Honorable Herbert C. Kaufman, Judge of said Superior Court, and that jury also disagreed. (R. 7.)

Again, petitioners were brought to trial before the said Superior Court, this time before the Honorable Edward P. Murphy, Judge of said Superior Court, and the selection of a jury was thereupon commenced on the 17th day of September, 1946. (R. 7.) Thereafter, on Thursday, September 19, 1946, a jury of twelve qualified citizens was selected, sworn and impaneled to try the cause. (R. 15.) This third jury included Thomas J. Furner (R. 15), a resident of the City and County of San Francisco, State of California.

Furner, like the other jurors, was examined on his *voir dire* by the prosecution and by the appellants. (R. 14.) Obviously he answered all questions by the prosecution and by the defense satisfactorily as no peremptory challenge was directed toward him although, as the record shows, neither side exercised all of its peremptory challenges. (R. 7-15.)

After the twelve jurors, including Furner, were so impaneled and sworn to try the petitioners (R. 15, 16; R. 97), the Assistant District Attorneys prosecuting this case, as well as Mr. Walter McGovern and Mr. John R. Golden, attorneys for petitioners, were called into chambers by the trial judge, at which time the judge advised all present that he had been told, and that it was thus the information of the Court that Juror Furner was presently informed against by the District Attorney of San Francisco on a felony charge, and that he had not yet been tried. The Court announced this charge as an alleged violation of Section 480 of the California Vehicle Code (hit and run).* (R. 97.)

The Court thereupon stated that for the reason that Furner stood accused of the violation aforesaid and that Furner's trial for this violation would be had in the same department of said Superior Court, that "it is the disposition of this Court in the exercise of its discretion that this juror should not serve upon the trial of this case". (R. 98.) All of this action by the Court and all of these proceedings were specifically objected to by Mr. Walter McGovern, counsel for the petitioners herein, on the ground that it was a violation of their federal constitutional rights. (R. 98-99.)

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*Violation of this section may be a misdemeanor. It does not necessarily involve moral turpitude. Failure to comply with *any* of the requirements of Sec. 482 Vehicle Code such as failure to exhibit operator's license to all occupants of all vehicles involved in the accident constitutes violation of Sec. 480 Vehicle Code.

Thereafter the Court called Mr. Furner, the juror, into chambers and asked Mr. Furner if he would like to be discharged from the jury. (R. 99.) Mr. Furner replied, "It is entirely up to yourself, your Honor." (R. 100.) Whereupon, in the following language, the Court stated that it would excuse Furner: "The Court: The record will show that, and the record will show that the Court in its discretion will excuse you, Mr. Furner" (R. 100), and Mr. Furner was thereupon and in the presence of the jury and the petitioners, discharged from the jury. (R. 101; 16.) Thereupon by order of the Court a new jury was impaneled by the substitution of one Lawrence A. Bailey in place and in stead of Thomas J. Furner. (R. 101; 16.)

Whereupon, petitioners through their counsel, Mr. Walter McGovern, moved the Court for a dismissal of each and all of the petitioners from custody upon the ground that their federal constitutional rights had been violated, said motion being as follows:

"Mr. McGovern: At this time all the defendants in this case move that they be forthwith dismissed from all of the charges now pending against them upon the grounds that the Court has indicated that it intends to proceed and try them by a jury other than that which was heretofore selected in this very proceeding in this third trial of the defendants on the charges entered against them in the Information herein on file. It is our position that in attempting to try these defendants at this time by this jury as it is presently constituted, the Court having excused Mr. Furner, who was heretofore sworn to try the case,

under the circumstances shown by the record, would be placing all of these defendants twice in jeopardy for the same offense, *in violation of their Constitutional rights, federal and state,* with which I know that your Honor is thoroughly familiar. I take it your Honor does not want me to specify any further, and I submit the motion." (R. 101-102.) (Emphasis added.)

This motion of the petitioners was denied by the said Court in the following terms:

"The Court: The motion will be denied. The record will further show that the grounds for denial are that, *in the opinion of the Court, no Constitutional guarantee, either state or federal, has been violated as far as each defendant is concerned;* no witness has been sworn, and the Court in the exercise of its discretion, does not believe it proper to proceed with a jury of twelve people, one of whom is presently charged with the commission of a felony by the Prosecutor and by the same attorneys who are conducting the prosecution in the instant case. An alternate juror has been chosen in accordance with the provisions of the Code and upon the excusal of the Juror Furner, the alternate juror was substituted in his place in accordance with the Court's understanding of what the proper procedure to be followed is. And for those Reasons (sic) the motion is denied." (R. 102.) (Emphasis added.)

After denial of this motion, and upon the convention of Court the next day, petitioners through their attorney, John R. Golden, Esq., entered a plea of

once in jeopardy for the offenses charged. Upon the statement of the Court the record shows that this plea was duly and timely made and that the plea was denied by the said Court. (R. 223-224.)

After the denial of the petitioners' plea of once in jeopardy, the trial proceeded to a verdict returned by the jury of guilty against all petitioners and on both counts of the information. (R. 89-90; 573.)

Later on, and at the time that petitioners appeared for judgment, petitioners through their counsel, Walter McGovern, Esq., again moved for their dismissal upon the grounds that their rights under the Federal Constitution had been violated (R. 573-574) and thereupon the Court denied the motion and sentenced the petitioners. (R. 575.)

Each petitioner thereafter appealed to the District Court of Appeal of the State of California, First District, on the ground that they were twice placed in jeopardy for the same offense, they were denied their federal constitutional rights under the 14th Amendment to the United States Constitution and that they were denied due process of law and equal protection of the laws. (R. 93.)

Thereafter the aforesaid District Court of Appeal, First Appellate District, in an opinion and decision handed down by said Court on the 25th day of February, 1948, affirmed the conviction and judgment of the Superior Court without discussion or comment on the federal question involved. (R. 577-591.) Whereupon petitioners applied to the Supreme Court

of the State of California for a hearing by that Court. (R. 591-616.)

That Court, on the 25th day of March, 1948, denied a hearing (R. 616) and thereupon the matter returned to the District Court of Appeal, First Appellate District, State of California, and remittitur issued out of the said Appellate Court on the 27th day of March, 1948, to the Superior Court aforesaid. (R. 617.)

On the 7th day of June, 1948, this Honorable Court extended the time within which these petitioners could petition this Court for a writ of certiorari up to and including the 24th day of July, 1948. (R. 619.) Thereafter and on the 16th day of July, 1948, this Honorable Court again extended petitioners' time within which to file a petition for a writ of certiorari up to and including the 23rd day of August, 1948. (R. 620.)

THE CONSTITUTIONAL QUESTION INVOLVED.

The constitutional question involved is as follows:

1. Is it not obviously a fundamental deprivation of trial by "due process" in a criminal matter for the trial Court to discharge a jury already impaneled and sworn and charged with the deliverance of a case by removing an accepted and competent juror, and then swear and impanel a new and different jury for the trial of the defendants and thereupon submit the cause to the second jury?

2. Is it not a violation of the due process and equal protection of the law clauses of the 14th Amendment to the United States Constitution for a State Court to place certain defendants twice in jeopardy for a violation of the same offenses?

STATEMENTS REQUIRED BY RULES 12 AND 38 OF THE SUPREME COURT.

(a) Jurisdiction of the Court.

This matter is within the jurisdiction of the above entitled Court by reason of Section 237b of the Judicial Code of the United States, as amended.

The basis upon which it is contended that this Court has jurisdiction is as follows:

This Court has held that certiorari will issue to review a conviction of accused wherein the accused have contended that in so being convicted they were placed twice in jeopardy for the same offense.

While this Court has never heretofore determined if the principle of double jeopardy is or is not included within the due process and equal protection of the laws clauses of the 14th Amendment to the Constitution of the United States, it has on several occasions determined that this Court has jurisdiction to issue a Writ of Certiorari to a State Court for the very purpose of determining whether or not that principle is so included within the ban of the 14th Amendment. However, it is to be noted that a United States District Court has held that the principle of double jeopardy is protected by the 14th Amendment.

(b) Cases sustaining jurisdiction.

Petitioners believe that the following cases sustain the jurisdiction of this Court:

Keerl v. State of Montana, 213 U. S. 135, 53 L. Ed. 734 (1909);

Ex parte Ulrich, 42 Fed. 587 (Mo., 1890);

Dreyer v. State of Illinois, 187 U. S. 71, 47 L. Ed. 79 (1902);

Palko v. State of Connecticut, 302 U. S. 319, 82 L. Ed. 288 (1937);

Amrine v. Tines, 131 Fed. (2d) 827 (Circuit Court of Appeals, Tenth Circuit, 1942).

(c) The decision and judgment of the District Court of Appeal, First Appellate District, State of California, which in this case is the Court of final decision.

The opinion and decision of the District Court of Appeal, First Appellate District, State of California, was rendered on February 25, 1948. (R. 577-591.)

A petition for hearing by the Supreme Court of the State of California was denied on March 25, 1948. (R. 616.)

The judgment affirming the convictions of petitioners was entered on February 25, 1948, and became final on March 27, 1948, when remittitur issued out of said District Court of Appeal to the trial Court. (R. 617.)

(d) The stage and the proceedings in the Court of first instance at which and the manner in which the Federal question sought to be reviewed was raised.

The manner in which the constitutional question of whether the discharge of a regularly impaneled and sworn jury and the trial of the defendant by a second

sworn and impaneled jury is a denial of due process, and whether or not placing a defendant in double jeopardy by the agent of a State is a violation of the 14th Amendment to the Constitution of the United States, arose in the trial Court and that Court ruled thereon in the manner as follows:

After having been tried by two different juries in the Superior Court of the City and County of San Francisco, State of California, the petitioners herein were brought to trial and the selection of a jury was commenced to try their cause in Department No. 11, of the aforesaid Superior Court, the Hon. Edward P. Murphy, judge presiding, on the 17th day of September, 1946. Thereafter, and on Thursday, September 19, 1946, a jury of twelve qualified citizens was selected as a jury and sworn and impaneled to try the cause. Thereafter, the aforesaid Court learned that one Thomas J. Furner, a member of this jury, was under information by the District Attorney's office of San Francisco, an a charge of having violated the California Vehicle Code, Section 480 (hit and run). The said Judge Murphy, in chambers, and in the presence of counsel for the people and counsel for the petitioners and before the clerk of said Court and reporter therein, stated that in his discretion he was going to discharge the said juror Furner from the trial of the cause and from the jury of which he was a member. As counsel for all of the petitioners, Walter McGovern, Esq., imposed the following objection on the basis of the 14th Amendment to the Constitution of the United States:

"Mr. McGovern: Yes, your Honor. On behalf of the five defendants we object to all of the contemplated proceedings by this Court as just outlined in the statement just made by your Honor. It is our position that a jury in this case of People v. Burns and others have been duly and regularly sworn and impaneled to try this case. We are ready to proceed. There is no provision of law whereby the action contemplated by this Court may be carried out legally. We submit that the fact, if it be a fact, that this particular juror has been accused of a crime is not in and of itself sufficient reason to justify this Court in taking this action. We point out that the mere fact that a man is accused of crime is not sufficient grounds for a challenge for cause and we say with the utmost respect to this Honorable Court that if these proceedings are followed it will be a denial to all five defendants *of their Constitutional rights, the rights under the Federal Constitution whereby they are guaranteed the equal protection of the laws, and rights* under the Constitution of the State of California whereby no defendant may be in jeopardy twice for the same offense.

We submit that if this juror is brought into your Honor's chambers and advised as your Honor intends so to do, that it would be intimidating the juror and that it will possibly scare him into asking to be excused from service in this case, and putting another juror in his place will be denying to us our right to be tried by a jury of our own selection.

I take it we have explained in detail heretofore all our objections and I won't burden the Court with any

more details, and of course my objection is made with great respect to the Court." (R. 98-99.) (Emphasis added.)

The Court, aforesaid, rendered no comment or decision on this objection; and thereafter, the juror Furner having been discharged and another person having been substituted in his place and stead, Walter McGovern, Esq., as attorney for the petitioners, made the following motion, based upon the 14th Amendment to the Constitution of the United States, in the following words:

"Mr. McGovern: At this time all the defendants in this case move that they be forthwith dismissed from all of the charges now pending against them upon the grounds that the Court has indicated that it intends to proceed and try them by a jury other than that which was heretofore selected in this very proceeding in this third trial of the defendants on the charges entered against them in the information herein on file. It is our position that in attempting to try these defendants at this time by this jury as it is presently constituted, the Court having excused Mr. Furner, who was heretofore sworn to try the case, under the circumstances shown by the record, would be placing all of these defendants twice in jeopardy for the same offense, *in violation of their Constitutional rights, Federal and State,* with which I know that your Honor is thoroughly familiar. I take it your Honor does not want me to specify any further, and I submit the motion." (R. 101-102.) (Emphasis added.)

The judge of said Court thereupon denied the motion stating that no Federal constitutional privileges had been abridged, as follows:

"The Court: The motion will be denied. The record will further show that the grounds for denial are that, *in the opinion of the Court, no Constitutional guarantee, either State or Federal, has been violated as far as each defendant is concerned;* no witness has been sworn, and the Court in the exercise of its discretion, does not believe it proper to proceed with a jury of twelve people, one of whom is presently charged with the commission of a felony by the Prosecutor and by the same attorneys who are conducting the prosecution in the instant case. An alternate juror has been chosen in accordance with the provisions of the Code and upon the excusal of the Juror Furner, the alternate juror was substituted in his place in accordance with the Court's understanding of what the proper procedure to be followed is. And for those Reasons (sic) the motion is denied." (R. 102.) (Emphasis added.)

Thereafter the trial proceeded with the taking of testimony, and argument by counsel. The matter was submitted to the jury and a verdict of guilty was returned on both charges of felony as against all five defendants, the petitioners herein. Then, at the time set for judgment by the Court, Walter McGovern, Esq., as counsel for petitioners, again raised the Federal question involved in the following motion:

"Mr. McGovern: In this matter, your Honor, I should like permission to state to the Court that after

a number of conferences between Major Golden and Mr. Ilgenfritz and myself and other lawyers interested in the defense, and after consultation with the defendants, we are more than ever convinced, as far as we are concerned, that we stand on solid ground so far as our objection heretofore made to the trial of this case after the Juror Furner was dismissed or excused. We have advised our clients that it might jeopardize our position were we to move for a new trial or ask for probation, and they have agreed with us that they should not make these motions and we are not doing so.

"Now, so far as judgment is concerned, your Honor, we oppose this Court pronouncing judgment upon these defendants for the particular reasons heretofore specified. And I should like, with the permission of the Court, to remind you that after the first jury in this case was sworn and impaneled to try these defendants that we were called into chambers and there Mr. Lynch, the Assistant District Attorney, advised the Court that a gentleman by the name of Furner was serving on the jury and that it was his information that Mr. Furner was presently informed against by the District Attorney of this City and County on a felony charge, and that he had not yet been tried. We protested any action being taken as far as Mr. Furner was concerned because, as we pointed out to the Court, the mere fact that a man is accused of a crime in and of itself is not grounds for challenge for cause and it does not disqualify him as far as the law of this State is concerned from serving on a jury. It is the Legislature that determines the qualifications of jurors, and so far as the record shows Mr. Furner

did meet those qualifications. He was passed for cause and no peremptory challenge was directed against him. However, your Honor indicated that you believed he should not serve and it was your intention to send for Mr. Furner and give him an opportunity to ask to be excused. We protested that, and subsequently he was sent for, and proceedings were had, most of which, in fact all of which from that time on following, is a matter of record.

"Now, I take it your Honor knows our position on that particular point and with that explanation we want the record to show that we are opposed to and protest against this Court proceeding to pronounce judgment upon these five defendants on the grounds heretofore stated, and, to summarize, *that they were not tried according to the principles of common law that subsequently were written into the Constitution of the United States* and the Constitution of the State of California and into the Codes of our State." (R. 573-574.) (Emphasis added.)

This motion was denied, and petitioners were thereupon sentenced to terms in the State Penitentiary.

(e) The time and manner in which the Federal question sought to be reviewed was raised in the District Court of Appeal and on petition for hearing in the Supreme Court of California.

Upon conviction all petitioners promptly and regularly notified the trial Court of their intention to appeal the judgments pronounced upon them (R. 93) thereupon notifying such Court that they would appeal its action in placing petitioners twice in jeopardy for the same offenses.

In support of their appeal and pursuant to law and practice petitioners, in their opening brief filed in the said District Court of Appeal, First Appellate District, State of California, stated their position on such appeal and based the same solely on the denial of their constitutional rights not to be placed in jeopardy twice for the same offenses.

Petitioners commenced their opening brief with the following language:

> "To the Honorable John T. Nourse, Presiding Justice, and to the Honorable Associate Justices of the District Court of Appeal of the State of California, in and for the First Appellate District, Division Two:
>
> Appellants appeal from a judgment of conviction. They elect to rely solely, in this appeal, on their contention that the trial Court deprived them of their constitutional rights not to be placed in jeopardy twice for the same offense. They seek no relief merely because of errors of procedure, but, invoking the shield of the Constitution they pray this Honorable Court to set them free here and now." (App. ii.)

Thereafter petitioners argued in said brief that the unwarranted removal of a juror, after the jury was impaneled and sworn, solely because said juror was *accused* of a crime, was without warrant in law, and that if he was so removed that action by the trial Court would constitute a "denial to all defendants of their constitutional rights, including the Federal guarantee of equal protection of the laws . . ." (App. iii.)

Thereafter petitioners again made clear to the Appellate Court their position that they had been denied the privileges and immunities of the 14th Amendment to the Constitution of the United States by reason of the action of the Court below when they argued in said brief, as follows:

> "Appellants were denied due process of law and the equal protection of the laws and their rights not to be tried twice for the same offense in violation of the federal and state constitutions." (App. iv.)

Thereafter, in their closing brief in said Appellate Court, petitioners argued as follows, in answering the argument of respondent on petitioners' appeal:

> "Respondent repeats in various intemperate phrases that appellants' position is: 'We wanter (d) Furner.' Of course we would have made the same objections on the same grounds had the Court, under similar circumstances, illegally removed any other juror. All we wanted was due process of law—to be in jeopardy only *once*—to be tried by the only valid jury that was sworn to try the case. We offer no apologies for seeking the protection of the Constitution." (App. vi.)

Specifically, in their closing brief to the Appellate Court, the petitioners brought to the attention of that Court their assertion that they had been denied due process of law by the trial Court. Argued the petitioners:

> "Respondent presents the novel contention that no 'substantial prejudice' has been shown by appellants in the removal of Furner. This appar-

ently means that whenever the issue of double jeopardy is raised the accused must show 'substantial prejudice', otherwise he may be denied due process of law and be tried times without number for the same offense." (App. vii.)

Thereafter the matter was submitted to the Appellate Court aforesaid, and which Court returned its opinion and decision on the 25th day of February, 1948, wherein that Court made no reference to the Federal question involved.

Thereupon the petitioners herein applied to the State Supreme Court for a hearing by that Court. (R. 591-616.)

In so petitioning that Court petitioners herein thus stated their position regarding the Federal Constitution:

"The appeal herein was based, after conviction, on the ground that the trial Court deprived appellants of their constitutional right not to be placed in jeopardy twice for the same offense, as provided in Section 13 of Article I of the California Constitution and that they were denied due process of law and the equal protection of the laws as guaranteed by the Federal Constitution.

The record* shows without question that after the jury had been impaneled and sworn the trial Court arbitrarily removed one of the regular jurors (over appellants' objections, timely made) in an irregular manner, and for no legal reason whatsoever, and, then ordering the alternate to be sworn, proceeded to trial and judgment, brushing aside appellants' plea of double jeopardy.

Appellants rely on the illegal removal of the regular juror. They did and do contend that when the jury is impaneled and sworn the defendants enter into jeopardy, and, that if a juror is unlawfully removed the jury is destroyed and the defendants are acquitted in the eyes of the law, as was held by this Court in Jackson v. Superior Court, 10 Cal. (2d) 350.

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*The facts on which appellants rely are not disputed. There is set out verbatim in appendix 'B' attached hereto all the proceedings in the trial Court which involved the denial to appellants of their constitutional rights (state and federal) and upon which they base their petition as they did their appeal)". (R. 591-592.)

As stated previously in this petition, the application of petitioners for a hearing in the State Supreme Court was denied.

(f) The grounds upon which it is contended that the question involved is substantial.

No greater duty has any Court, State or Federal, than the enforcement and protection of the rights guaranteed by the Constitution of the United States. The instant case is marked by the violation of the constitutional rights of these petitioners to be treated as is their due under the 14th Amendment to the Constitution of the United States, to be tried as has been the right of all other accused persons to be tried, within the pale of a substantial and procedural due process of law and within the protection of the laws equally applied to them as to all other defendants.

If anything else, the language of the due process clause of the 14th Amendment to the United States

Constitution means that no defendant shall be subject to be twice placed in jeopardy for the same offenses; or, in other words, that no defendant shall be held to answer to a duly impaneled and sworn jury of his peers more than once for the same offenses. Of course this must be held the very essence of due process or otherwise any State could try any defendant, he having been acquitted, for time after time after time, till a verdict favorable to his prosecutors is reached.

By thus harassing the defendant through the Courts of any State, the protection of liberty and due process against State action by the 14th Amendment to the Constitution of the United States would be a hollow mockery.

As important and substantially fundamental as the question is, and despite the number of times it has been before this Court, we believe this Court has never decided whether or not the imposition of double jeopardy by an agent of a State is within the prohibition of the 14th Amendment to the United States Constitution.

In all of those instances where the problem has been presented to this Court, the facts of the given situation have been such that this Court has been able to hold that jeopardy factually did not exist, and therefore it was not incumbent on this Court to determine whether or not the prohibition of the 14th Amendment applied.

We submit with respect that this problem should be given answer. Here is a situation in which undeniably

(as admitted in the opinion upholding their conviction) a juror was illegally removed from a competent and duly sworn and impaneled jury, thus discharging the jury as is admitted by the Court finally deciding this case in the State Courts. Unquestionably, therefore, double jeopardy in fact exists. We submit that to deny a favorable decision in this case is to deny due process in its essence.

The danger of allowing this denial of constitutional rights to become part of our settled law is stated by this Honorable Court in *Kotteakos v. United States,* 328 U. S. 750 at 773, 90 L. Ed. 1557 at 1571:

> "That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth." (*Kotteakos v. United States,* 328 U. S. 750 at 773, 90 L. Ed., 1557 at 1571.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

Petitioners herein advance as reasons for the issuance of the writ prayed for herein the following, to-wit:

First: That the reviewing California Court, of final decision, in this instance, has decided a federal question of substance not heretofore determined by

this Court, namely: Whether the imposition of double jeopardy by an agent of the State is prohibited by the 14th Amendment to the Constitution of the United States as a denial of due process of law.

Second: Petitioners herein have been subjected to a prosecution, which, in effect, decrees that any defendant may be tried as many times and as often for the same offense as the trial judge may desire.

CONCLUSION.

For the reasons herein stated each petitioner prays that this Honorable Court issue a Writ of Certiorari to the District Court of Appeal, First Appellate District, State of California, to the end that the question involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,
August 9, 1948.

Respectfully submitted,
SIMEON E. SHEFFEY,
Attorney for Petitioners.

WALTER MCGOVERN,
JOHN R. GOLDEN,
Of Counsel.

Certificate of Counsel.

I hereby certify that I am the attorney for the petitioners in the above entitled case, and that in my judgment the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
August 9, 1948.

Simeon E. Sheffey,
Attorney for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No.

INEZ L. BURNS, MABEL SPAULDING, MYRTLE RAMSAY, JOSEPH HOFF and MUSETTE BRIGGS,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, STATE OF CALIFORNIA.

The opinion of the respondent Court, District Court of Appeal, First Appellate District, State of California, was rendered on February 25, 1948 (R. 577-591), and the same is reported in Advance California Appellate Reports in 84 A.C.A. 28.

The petition for a hearing in the Supreme Court of the State of California was denied by that Court on March 25, 1948. (R. 616-617.)

Thereupon remittitur issued out of respondent Court to the trial Court on the 27th day of March, 1948. (R. 617-618.)

On the 7th day of June, 1948, this Honorable Court extended the time within which these petitioners could petition this Court for a writ of certiorari up to and including the 24th day of July, 1948. (R. 619.) Thereafter and on the 16th day of July, 1948, this Honorable Court again extended petitioners' time within which to file a petition for a writ of certiorari up to and including the 23rd day of August, 1948. (R. 620.)

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 237b of the Judicial Code of the United States.

Petitioners contend that this Court has jurisdiction on the ground that the above mentioned District Court of Appeal of California denied to the petitioners a right guaranteed by the Federal Constitution, which right was specially pleaded and contended throughout all of the proceedings in the trial Court below and before said respondent Court, and that said plea and contention were decided against petitioners, and each of them, in all of said Courts.

The right so contended for is that by placing petitioners twice in jeopardy for the same offense the trial Court and the District Court of Appeal denied to petitioners due process of law and equal protection

of the laws as guaranteed them in the 14th Amendment to the Constitution of the United States.

Under applicable decisions of this Court, the rule is fundamental that this Court has jurisdiction to review the question whether or not an accused has been denied due process of law and equal protection of the laws within the 14th Amendment when the accused contends that such a denial arose by reason of his being placed twice in jeopardy for the same offense by a State Court.

Moreover, the question raised by this petition becomes substantial and urgent because this Honorable Court, while confronted with the question several times, has heretofore declined to determine this fundamental question, namely: *Is the denial by a State Court of the right not to be placed twice in jeopardy for the same offense a denial of the right of an accused to due process of law and equal protection of the laws within the 14th Amendment to the Constitution of the United States?*

However, while never decided by this Court the question has been decided in the affirmative by a Federal District Court in the case of *Ex parte Ulrich,* 42 Fed. 587 (Mo., 1890).

The cases sustaining this proposition are:

Dreyer v. State of Illinois, 187 U. S. 71, 47 L. Ed. 79 (1902);

Keerl v. State of Montana, 213 U. S. 135, 53 L. Ed. 734 (1909);

Palko v. State of Connecticut, 302 U. S. 319, 82 L. Ed. 288 (1937);

Amrine v. Tines, 131 Fed. (2d) 827 (Circuit Court of Appeals, Tenth Circuit, 1942);
Ex parte Ulrich, 42 Fed. 587 (Mo., 1890).

In each of the foregoing cases this Court assumed jurisdiction in order to review the question of whether or not the action of a State Court in placing an accused person twice in jeopardy for the same offense denies to such person one of those fundamental principles of liberty and justice that go to make up "due process" within the meaning of the 14th Amendment to the United States Constitution; and whether or not such action by a State Court denies to such an accused person the equal protection of the laws as guaranteed by the 14th Amendment.

Up to this time, this Honorable Court has never decided the question because, unlike the situation here, double jeopardy did not in fact exist in those cases heretofore attended upon by this Court. In view of this situation, the petition herein assumes an urgency of decision amplified beyond even those vast and inclusive bounds afforded by the nature of the right here violated and thus denounced by the 14th Amendment to the Constitution of the United States.

STATEMENTS REQUIRED BY RULES 12 AND 38 OF THE SUPREME COURT.

In the petition for the writ filed herein by petitioners there has been set forth in detail all of the statements required by Rules 12 and 38 of this Court. Such statements are hereby specifically referred to

and made a part of this brief and will be found in the petition under the headings and at the pages here designated, to-wit:

(a) Jurisdiction of the Court, *supra,* page 10;

(b) Cases Sustaining Jurisdiction, *supra,* page 11;

(c) The decision and judgment of the District Court of Appeal, First Appellate District, State of California, which, in this case, is the Court of final decision, *supra,* page 11;

(d) The stage and the proceedings in the Court of first instance at which and the manner in which the Federal question sought to be reviewed was raised, *supra,* page 11;

(e) The time and manner in which the Federal question sought to be reviewed was raised in the District Court of Appeal, First Appellate District, State of California, and that Court's action thereon, *supra,* page 17;

(f) Grounds upon which it is contended that the question involved is substantial, *supra,* page 21.

STATEMENT OF FACTS.

The statement of the case setting forth all that is material to a consideration of the question presented, with appropriate page references to the record, has been set forth in the preceding petition under the heading "Statement of the Case" *supra,* pages 3 to 9 and under the heading "The Stage and the Proceedings in the Court of First Instance at Which and the Manner in Which the Federal Question was Raised", *supra,* pages 11 to 17.

The facts so set forth in detail in the petition, may be summarized as follows:

After having been tried twice by two separate juries for the offenses for which they were convicted, and which juries were dismissed by the judge presiding therein because of their failure to agree, the defendants were again tried by the Superior Court of the City and County of San Francisco, on the same charges, that trial having commenced on the 17th day of September, 1946. That day, and the 18th and part of the 19th of September, 1946, were taken up in the selection of a jury. At approximately 11:00 o'clock A.M. a jury of twelve persons, including one Thomas J. Furner, had been selected and was impaneled and sworn to try the case. The Court then gave the usual admonition and stated that the Court would adjourn until 2:00 o'clock of the afternoon of that day. Like all of the other jurors, Furner had been examined on his *voir dire* by both the prosecution and defense and was found satisfactory and was duly accepted by prosecution and defense.

Upon the convening of the trial that afternoon, an alternate named Lawrence A. Bailey was selected by counsel to serve as such alternate juror in the cause. Thereupon the Court requested the presence of counsel for the prosecution and defense in chambers. Therein, in the presence of the clerk of the Court and the official phonographic reporter duly assigned to transcribe the cause, the Court stated to counsel, over the strenuous objection of the defense, that it had determined in "its discretion" to dismiss the regular juror Furner from the trial of the cause. The Court

stated as its reason for so doing the sole fact that Furner had been charged by the District Attorney with violating Section 480 of the Vehicle Code of the State of California.

All of this was objected to by petitioners on the grounds that it constituted a denial of their above mentioned federal and state constitutional rights.

Thereupon the trial judge called juror Furner into chambers and informed that juror that he had been discharged from duty as a member of the jury of which he was a part for the sole reason as aforesaid. Counsel for the defense again objected, on said constitutional grounds, to these proceedings.

Thereafter the Court dismissed the impaneled and sworn jury by discharging therefrom the juror Furner; and a new jury, including the said alternate Bailey, was sworn and impaneled to try the cause.

It was this illegal jury and their trial of the cause to which the petitioners objected as placing them twice in jeopardy for the same offense. The plea of double jeopardy was duly and timely made by counsel for the defense, and this plea along with the contention of due process of law and the denial of the equal protection of the laws within the 14th Amendment was denied by the trial Court.

It was this illegal jury which convicted defendants of the charges of which they were accused. The conviction was immediately and regularly appealed by the petitioners herein on the sole ground of double jeopardy. The contention of petitioners that they had been twice placed in jeopardy for the same offense and that this double jeopardy denied them the rights

guaranteed to all accused by the 14th Amendment, was emphatically argued before the District Court of Appeal, First Appellate District, State of California. This contention was ignored by that Court.

Thereafter a hearing in the Supreme Court of the State of California was asked and denied, no opinion having been filed by said Court.

THE ERROR.

Respondent Court erred in holding that the trial of the petitioners by a jury substituted for the regular jury of which Thomas J. Furner was a member was not double jeopardy; and said Court erred further in not deciding that such double jeopardy was a denial to petitioners of their rights under the due process and equal protection of the laws clauses of the 14th Amendment to the Constitution of the United States.

ARGUMENT.

(1) STATEMENT OF QUESTION INVOLVED.

The record unequivocally discloses that petitioners were twice placed in jeopardy for the same offense by the respondent Court. It is admitted by the District Court of Appeal that rendered the opinion in the original appeal of the cause that the action of the trial judge in removing the juror Furner from the duly impaneled and sworn jury of which he was a member was an illegal procedure and not supported by law; and it is admitted that the only grounds for removal of a juror from a jury which has been duly

and regularly impaneled and sworn is found in Section 1089 of the Penal Code of the State of California.

The discharge of the juror Furner was a discharge of the jury.

Since that jury of which he was a member had been impaneled and sworn to try the cause, the petitioners were in jeopardy at that point. Therefore, any subsequent trial of the petitioners, as in this case, amounted to a denial of the right of petitioners not to be placed twice in jeopardy for the same offense.

Petitioners herein timely and duly and regularly objected to the actions of the trial Court on the ground of the denial to them of due process and equal protection of the laws as guaranteed by the 14th Amendment to the Constitution of the United States.

The constitutional question for consideration by this Honorable Court, therefore, may be stated thusly:

Is the denial by respondent Court of the rights of the petitioners not to be placed twice in jeopardy for the same offense, a denial to these petitioners of their rights to due process of law and equal protection of the laws, guaranteed by the 14th Amendment to the Constitution of the United States?

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(2) THIS COURT HAS JURISDICTION TO REVIEW THE QUESTION INVOLVED.

While it has never been finally decided by this Court that the action of a state Court in placing an accused twice in jeopardy for the same offense is a

violation of the due process and equal protection of the laws clauses of the 14th Amendment, this Court having previously preferred to leave the question unanswered, nevertheless, jurisdiction of the question involved has been assumed by this Court on several occasions.

In order of time, the first case to treat this question is *Dreyer v. State of Illinois,* 187 U. S. 71, 47 L. ed. 79 (1902). In that case the defendant was convicted, over his plea of double jeopardy, upon a second trial, after the jury had been discharged in his first trial. Therefore, it was the contention of the defendant that because the jury had been discharged on his first trial he was then placed twice in jeopardy when he was tried by the second jury.

The question of double jeopardy was then brought to the attention of this Court by a writ of error. This Court, however, determined, under the rule of *United States v. Perez,* 6 L. ed. 165, 9 Wheaton 579 (1824), that double jeopardy did not in fact exist, and therefore it was not incumbent on this Court to determine whether or not the principle of double jeopardy is embodied in the 14th Amendment. Therefore, this Court at that time merely raised the question in the following language:

> "Upon the face of the question under examination the inquiry might arise whether the due process of law required by the 14th Amendment protects one accused of crime from being put twice in jeopardy of life or limb. In other words, is the right not to be put twice in jeopardy of life or limb forbidden by the 14th Amendment;

> or, so far as the Constitution of the United States is concerned, is it forbidden only by the 5th Amendment, which, prior to the adoption of the 14th Amendment, had been held as restricting only the powers of the national government and its agencies?" (*Dreyer v. State of Illinois,* 187 U. S. 71, 85; 47 L. ed. 79, 86.)

In 1909, in the case of *Keerl v. State of Montana,* 213 U. S. 135, 53 L. ed. 734, the question was again brought to the attention of this Court; and again this Court took jurisdiction of the question, but determined not to render any answer.

In that case defendant was found guilty of murder in the second degree and upon a reversal of the judgment a new trial was ordered. The second jury disagreed. On the third trial the defendant interposed a plea of once in jeopardy. This plea was overruled and the defendant was found guilty of manslaughter.

Defendant applied to this Court for a writ of error on the ground that he had been placed twice in jeopardy for the same offense. The Court took jurisdiction of the matter and issued a writ of error, but declined to answer the question involved. Mr. Justice Brewer, speaking for the Court, said:

> "The defendant during the trial having specifically claimed that the action of the court in denying him the benefit of the plea of once in jeopardy operated to deprive him of his liberty without due process of law, contrary to the 14th Amendment to the Constitution of the United States, *our jurisdiction of the writ of error cannot be questioned.* (Citation of authorities.)" (Emphasis

added.) (*Keerl v. State of Montana,* 213 U. S. 135, 137; 53 L. ed. 734, 736.)

Specifically, therefore, this Court held in the above case that it has jurisdiction to review the decision of state court of the question here involved.

Again, however, this Court declined to decide the question of whether or not double jeopardy is a principle embodied in the 14th Amendment to the Constitution of the United States. For in this case, also, the rule of *U. S. v. Perez,* 6 L. ed. 165, 9 Wheaton 579 (1824) applied.

Thereafter, in 1937, this Court again took jurisdiction of the question involved in this petition, in *Palko v. State of Connecticut,* 302 U. S. 319, 82 L. ed. 288 (1937). The question before the Court was whether or not an accused was placed twice in jeopardy for the same offense when he was convicted upon a trial which occurred after the state had succeeded in obtaining a reversal, on appeal, of a prior acquittal.

This Court declined to state any general rule determining that the principle of double jeopardy is or is not included in the 14th Amendment to the Constitution. Rather, this Court took the position that the facts and circumstances of the individual case, in which a question of double jeopardy may arise must determine whether or not, *in that particular case,* due process was denied the accused who contends he was placed twice in jeopardy.

Apparently, therefore, it is the holding of this Court in *Palko v. State of Connecticut,* 302 U. S. 319,

82 L. ed. 288 (1937), that this Honorable Court always has jurisdiction to review the question of whether or not double jeopardy in a state court is a principle which is part of the 14th Amendment.

The position taken by this Court, whenever the question involved in this petition has been brought to its attention, is clearly stated in the case of *Amrine v. Tines,* 131 Fed. (2d) 827 (10th Circuit, 1942). In that case the appellant Amrine, warden of the Kansas State Penitentiary, appealed from a judgment which ordered that the appellee, Tines, be discharged from custody, pursuant to an order on the hearing of the appellee's application for a writ of habeas corpus.

After the jury had been impaneled and sworn, and the state had completed its case, the Court, on its own motion, dismissed the case, without prejudice, on the ground that the information was defective.

Concerning the appellee's contention that he had been placed twice in jeopardy for the same offense, and thereby had been deprived of his rights under the due process clause of the 14th Amendment, the Circuit Court stated, as follows:

> "Obviously, if the right sought to be vindicated does not come within the dominant command of the Fourteenth Amendment, jurisdiction to inquire concerning the cause of restraint does not exist in the Federal court, either by habeas corpus or appropriate review on appeal. ***But courts which have had occasion to consider the question have deliberately refrained from completely closing the door to Federal inquiry.*** They have been content with the answer that double jeopardy did

not factually exist when measured by the Federal rule. (Citation of authorities.)" (Emphasis added.) (*Amrine v. Tines,* 131 Fed. (2d) 827, 834.)

Thus, it is clear that the question involved in this petition has never been decided by the Supreme Court of the United States; but it is also true, and this is the pertinent fact on this petition, that on several occasions the Supreme Court of the United States has entertained the question. Therefore, because this Court several times before has taken jurisdiction of the question involved in this petition, and especially because this Court has always declined to answer the substantial question here involved, petitioners respectfully submit that this Court has jurisdiction to review this matter, and that such a review, in the interest of settlement of the law, should be had at this time.

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(3) ANY RIGHT WHICH IS A FUNDAMENTAL PRINCIPLE OF LIBERTY AND JUSTICE IS PROTECTED FROM STATE ACTION BY THE 14TH AMENDMENT.

What is due process of law?

It is generally said that the language "due process of law" and the phrase "law of the land", as that latter phrase appears in Chapter 39 of Magna Carta of 1215, have the same meaning. (12 *Am. Jur.* 261.) At least it is true that this principle of protection against arbitrary action by the government against the individual came over to this country from England as part of the common law. Therefore, it ap-

pears sound to argue that "due process of law" refers to that body of doctrines which went to make up those fundamental principles of liberty and justice which lie at the base of our civil and political institutions.

More exactly and particularly, "due process" has been defined in 12 *Am. Jur.* 262 as (1) the prevention of any conflict with the principles of the United States Constitution, and (2) if the act complained of does not violate the constitutional provisions then the Court must look to the usages and modes of proceeding embodied in the common and statutory law of England, which came to this country as the basis of our own common law.

Speaking of the latter test for determining the presence or absence of due process of law this Court stated in *Powell v. State of Alabama,* 287 U. S. 45, 77 L. ed. 158 (1932), as follows:

> "One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation." (*Powell v. State of Alabama,* 287 U. S. 45, 65, 77 L. ed. 158, 168.)

However, as was pointed out in *Powell v. State of Alabama,* 287 U. S. 45, 77 L. ed. 158, those principles of liberty and justice which were protected by

the common and statutory law of England are not the only elements of due process of law within the 14th Amendment, for the Court in that case pointed out that if the right of the petitioners in *Powell v. State of Alabama,* 287 U. S. 45, 77 L. ed. 158, depended on a showing that in early English history those persons accused of the commission of a felony in early days had the right to be defended by counsel, they necessarily must fail inasmuch as it is true that in the early days of English law those accused of the commission of a misdemeanor were entitled to counsel in their defense but those accused of the commission of a felony were not.

Obviously, the principle that an accused shall not be twice placed in jeopardy does not conflict with any principle of the United States Constitution, but is in full consonance therewith.

Therefore, if it is shown that the principle of double jeopardy was a doctrine "of the law of the land" of England at the time of the enactment of the Constitution of the United States; or, if it is shown that the principle of double jeopardy is one of those basic principles of liberty and justice, such as is the right to aid of counsel in the defense of a charge of felony, then, perforce, it is a denial of due process within the meaning of the 14th Amendment for a state to cause any defendant to be twice placed in jeopardy for the same offense.

(a) The right not to be placed twice in jeopardy for the same offense was a fundamental principle of the English "law of the land".

Some uncertainty is experienced in tracing the origin of the plea of double jeopardy. However, it appears that this plea, representative of the right, first appeared in the common law of England as the two pleas of *auterfoits acquit* and *auterfoits convict.* Moreover, it is certain that the principle of double jeopardy, as represented by these pleas, was a part of the "law of the land" at least as early as that period in the mediaeval law of England covered in the years 1066 to 1485.*

Apparently, therefore, the right not to be twice placed in jeopardy for the same offense was a principle of the common law of England long before our Declaration of Independence. Thus, the test spoken of in *Powell v. State of Alabama, supra,* must yield to the facts. Under that test, since the principle of double jeopardy was a settled usage in the common law of England at the time of the American Declaration of Independence, it must be accepted that it is an element of due process protected by the 14th Amendment to the Constitution of the United States.

(b) The principle of double jeopardy is a fundamental principle of liberty and justice protected by the 14th Amendment.

Upon the slightest consideration it is clear that the principle of double jeopardy is as fundamental to liberty and justice as is the right to trial by jury.

*W. S. Holdsworth, *A History of English Law,* Volume 3, page 614.

Denial of the right to not be placed twice in jeopardy for the same offense would mean that an accused could be tried by the state for the same offense times without number. Thus, while it might be that an accused person was never convicted of the crime of which he was charged, the harassment of the accused in the criminal courts would have the same effect as a conviction.

Any principle which is as old and widespread as the principle of double jeopardy must necessarily be a fundamental principle of justice and liberty. Born in the mediaeval days of the English common law, the principle was carried to this country by the founding fathers. Thereafter, as a doctrine of liberty known to them and to their ancestors, this principle was embodied in the 5th Amendment to the Constitution of the United States; and, thereafter, when it became apparent that some federal control must be had over state action, the principle was included in the 14th Amendment to the Constitution under the general cloak of the due process clause.

Sufficient proof of the fundamental character of the principle of double jeopardy is found by reference to the individual constitutions of the several states of the United States wherein widespread adoption of this principle has developed through the years.

The position of petitioners that the principle of double jeopardy is an element of due process within the meaning of that language of the 14th Amendment is better stated by the Court in *Ex parte Ulrich*, 42 Fed. 587 (Mo., 1890). In that case the accused was

discharged from custody on a writ of habeas corpus on the determination of the District Court that the action of a state which places an accused twice in jeopardy for the same offense is a denial to that accused of due process of law within the meaning of the 14th Amendment. In reaching this conclusion, the Court discussed the term "due process of law" at some length. In so doing, the Court quoted from *Murray v. Improvement Co.,* 18 How. 272, 276, as follows, stating those principles later announced in *Powell v. State of Alabama,* 287 U. S. 45, 77 L. ed. 158 (1932):

> " 'The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave congress free to make any process due process of law by its mere will. To what principles, then, are we to resort to ascertain whether this process enacted by congress is due process? To this the answer must be twofold. We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political conditions by having been acted on by them after the settlement of this country.' " (*Ex parte Ulrich,* 42 Fed. 587, 590.)

Following this discussion of the Supreme Court, the Court in *Ex parte Ulrich,* found that there is nothing in the Constitution which is in conflict with

the idea that a citizen cannot be twice placed in jeopardy for the same criminal offense, and considering the other test of the Court in *Murray v. Improvement Co.*, the Court in *Ex parte Ulrich* had this to say:

> ". . . we will find no principle of the common law, grounded upon the great rock of the *Magna Charta*, more firmly rooted than that no man shall be twice vexed with prosecution for the same offense. That was as much 'the law of the land' as that he should not be tried or condemned without process of law, and the judgment of his peers." (*Ex parte Ulrich*, 42 Fed. 587, 590.)

Again, in furtherance of this thought, the Court states at page 591:

> "As expressive of how deeply rooted this principle of the common law has ever been in the minds and convictions of the American people, as their common, inestimable, heritage of liberty from the institutions and usages of the mother country, the colonists, long before the adoption of the constitution, incorporated the provision respecting due process of law, or the law of the land, in all their local governments; and there has not been a constitution, state or federal, adopted on this continent, which does not contain the provision against double trials and punishments, or punishment after acquittal. It is imbedded in the very bonework of our political and judicial system." (*Ex parte Ulrich*, 42 Fed. 587, 591.)

Therefore, it seems clear that the tests for the determination of the applicability of the due process clause, as those tests are announced in *Powell v. State*

of Alabama, 287 U. S. 45, 77 L. ed. 158, are satisfied by the facts of this case.

First, it is clear that the principle of double jeopardy is a doctrine aged and fundamental in the common law of England, for as has been pointed out that doctrine was a part of the common law of England as early as the mediaeval period of 1066 to 1485.

Secondly, the test announced in *Powell v. State of Alabama,* 287 U. S. 45, 77 L. ed. 158, to the effect that those doctrines which are principles of fundamental liberty are elements of due process is satisfied in this instance as is clear in the language from *Ex parte Ulrich,* 42 Fed. 587.

Petitioners respectfully submit that a denial of the principle of double jeopardy is a denial of due process.

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(4) PETITIONERS WERE PLACED TWICE IN JEOPARDY FOR THE SAME OFFENSE.

As the record herein discloses, a jury was duly and regularly sworn and impaneled to try the petitioners before the regular juror Furner was discharged from the jury by the judge below. The record further discloses that Furner was a citizen of this country, a resident of San Francisco, and fully qualified in every respect to try the charges made against the petitioners. Furner suffered from no physical ailment nor from any moral shortcoming; he was intelligent and forthright; he was without bias or favor. Nevertheless, the trial Court, as the record shows, "in its

discretion" dismissed the juror Furner from the trial of the cause, and thereby discharged the jury.

It is the contention of petitioners that thereafter, when the trial Court swore in a new juror as a substitute for the juror Furner and thereby swore in a new jury to try the cause, that Court thereupon placed petitioners in jeopardy for a second time for the same offense.

(a) Petitioners were in jeopardy when the "Furner jury" was impaneled and sworn.

It is the unqualified rule in the Courts of California that once a jury has been duly impaneled and sworn upon the trial of a criminal cause, the accused has been placed in jeopardy. This rule is unequivocally expressed in the landmark case of *Jackson v. Superior Court,* 10 Cal. (2d) 350, 74 Pac. (2d) 243. In that case the defendants were placed on trial and the Court proceeded to impanel a jury. In the course of the *voir dire,* there occurred an irregularity in the order of peremptory challenges. However, a satisfactory jury was obtained and sworn. Neither party had exhausted its peremptory challenges.

Thereafter, upon the motion of the prosecution, the Court declared a mistrial on the ground that it had committed error in causing the irregularity in the order of peremptory challenges. The jury was discharged and the case continued to the following morning for retrial. Thereupon, defendants obtained a writ of prohibition against a further trial by the Superior Court. The Supreme Court of the State of California

permitted the writ to issue, and, in so doing, announced the rule in California on the matter of double jeopardy to be as follows:

> "The authorities are in unison that jeopardy attaches to a defendant when he is placed on trial before a court of competent jurisdiction upon a valid indictment or information before a jury duly impaneled and charged with his deliverance. At just what stage in the proceedings in a criminal action is the jury 'charged with the deliverance' of the defendant on trial? Respondents contend that until the information is read to the jury and the plea of the defendant is stated, the jury is not charged with his deliverance. At the first trial of petitioners the jury was impaneled and sworn but before the indictment was read or the plea stated to the jury the prosecution moved the court to declare a mistrial and discharge the jury. As we have seen, the court granted this motion against the protest of the defendant. This question as to when jeopardy attaches to a defendant placed on trial in a criminal action is settled in so far as the courts of this state have spoken by the authorities cited in the opinion of the District Court of Appeal hereinafter set forth. These authorities hold that a jury stands charged with the deliverance of a defendant when its members have been impaneled and sworn. Respondents cite cases from other jurisdictions to the contrary, but they are not controlling in the face of the decisions of our own courts." (*Jackson v. Superior Court,* 10 Cal. (2d) 350, 352; 74 Pac. (2d) 243, 244 (1937.)

(b) A jury is illegally discharged when one of its members is illegally discharged.

A jury is a unit of twelve, and when any element of the unit has been destroyed the jury (the unit) is destroyed. Thus, if one juror is illegally removed from the jury then, at that very moment, the jury is destroyed. This is the California rule as plainly announced in the case of *People v. Young,* 100 Cal. App. 18, 279 Pac. 824 (1929). In this case, decided by the District Court of Appeal, Second Appellate District, State of California, one Lester B. Zillgitt, a member of the jury, was illegally removed from the jury shortly after it had been duly impaneled and sworn. Immediately after the trial judge had stated the case to the jury, the Court recessed until 2:00 o'clock P.M. of the same day. Upon their return at that time the Court remarked that Zillgitt had communicated the fact he had learned that one Smith, a witness for the defendant Young, was a member of the same club as himself, and was a social friend of his, but that he did not previously know that Smith was to be a witness in the case. The juror stated that he did not believe his friendly relations would alter his attitude, but that "those things always have a bearing." Over the objection of counsel for the defendant, even though the prosecution had exhausted all of its peremptory challenges in the cause, the trial Court permitted the prosecution a peremptory challenge directed to the juror Zillgitt. Thereupon, defendant's counsel entered a plea of double jeopardy. The plea was denied and another juror substituted for the

juror Zillgitt. This new jury convicted the defendant Young and, upon his appeal to the District Court of Appeal, the conviction was reversed on the ground that defendant Young had already been in jeopardy when a jury, having as one of its members the substitute for the juror Zillgitt, was sworn to try the cause.

The Appellate Court pointed out that the trial judge, in ruling upon the challenge, said at page 22:

> "'I think any relationship, no matter how remote, ought to keep a person off the jury.'" (*People v. Young,* 100 Cal. App. 18, 22, 279 Pac. 824, 826 (1929).

And the Appellate Court in reaction to this statement of the trial judge, said:

> "It was not for the court to set up its judgment against the statute as to the qualifications of a juror. The juror did not know defendant, and did not know of any relationship. He only knew that he had seen something about it in the papers. If this juror could thus be excused without cause, there is no reason why the same thing could not have been repeated as often as the district attorney might have requested it. . . . Defendant had the right to have the jury impaneled according to the law of the state under which he was being tried." (*People v. Young,* 100 Cal. App. 18, 22; 279 Pac. 824, 826 (1929).

Finally, the Court points out, in the following language, the rule in California that the illegal removal from the jury of one juror is an illegal discharge of the complete jury:

"It is equally clear that the jury having been completed and regularly impaneled and sworn before the peremptory challenge was allowed, this appealing defendant was in jeopardy. Jeopardy signifies the danger of conviction and punishment which one charged with a criminal offense incurs when duly put upon trial before a court of competetent jurisdiction, and a jury has been charged with his deliverance." (*People v. Young*, 100 Cal. App. 18, 23; 279 Pac. 824, 826 (1929).

(c) No legal basis existed for the illegal discharge of the juror Furner and thus the illegal discharge of the jury.

The record unequivocally discloses that the only ground for the discharge of the juror Furner in the case at bar was the fact that he had been informed against by the District Attorney of the City and County of San Francisco for a violation of Section 480 of the Vehicle Code of the State of California. This is made plain by the language of the trial judge found at page 100 of the record:

"The Court. The record will show that, and the record will show that the Court in its discretion will excuse you, Mr. Furner. And you are to understand that there is no reflection upon you in that decision of mine. It is merely that I do not feel, in view of the fact that you have been informed against by the District Attorney, who is also prosecuting this case, that it would be fair to you or fair to anyone concerned to have you serve upon this case, and therefore you are discharged." (R. 100.)

That freedom from mere accusation of the commission of a crime is not one of the qualifications

required of jurors by the State of California is made plain by Sections 198 and 199 of the Code of Civil Procedure of the State of California, which sections announce the qualifications that must be possessed by jurors.

"(Persons competent to act as jurors.) A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

2. In possession of his natural faculties and of ordinary intelligence and not discrepit;

3. Possessed of sufficient knowledge of the English language."

(Section 198, Code of Civil Procedure.)

(Persons not competent to act as jurors.) A person is not competent to act as a juror:

1. Who does not possess the qualifications prescribed by the preceding section;

2. Who has been convicted of malfeasance in office or any felony or other high crime; or

3. Who has been discharged as a juror by any court of record in this state within a year, as provided in section 200 of this code, or who has been drawn as a grand juror in any such court and served as such within a year and been discharged; or who, in a county or city and county containing a population of not less than three hundred thousand as ascertained by the last preceding census taken under the authority

of the congress of the United States, or the legislature of the State of California, during the preceding two years shall have actually served on twenty days as a trial juror in the trial of cases in a court of record in this state; but a juror must in any event complete his service as such juror in the trial of a case in which he may be actually engaged. The clerk shall immediately remove from the jury list the name of any juror who becomes disqualified under this section.

4. A person who is serving as a grand juror in any court of record in this state is not competent to act as a trial juror in any such court. Any person who is serving as a trial juror in any court of this state is not competent to act as a grand juror in any such court."

(Section 199, Code of Civil Procedure.)

While conviction of a felony is a ground for disqualification of a juror, mere accusation of the commission of a crime (and it is to be noted that Section 480 of the California Vehicle Code may be either a misdemeanor or felony) is not a basis of disqualification.

Nor is there any other statutory authority in the State of California which can serve as a legal basis for the action of the trial judge in dismissing the juror Furner. The other applicable statutes read in part as follows:

(Alternate jurors: When to be called: Procedure governing: Drawing of alternate.)

(Drawing of alternate: Grounds: Substitution). If at any time whether before or after the final

submission of the case to the jury, a juror die or become ill, so as to be unable to perform his duty, or if a juror requests a discharge and good cause appear therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

(Section 1089, Penal Code.)

"(If juror after retirement becomes sick, etc., jury to be discharged.) If, after the retirement of the jury, one of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept for deliberation, the jury may be discharged."

(Section 1139, Penal Code.)

(Cause may be retried after discharge of jury: Exception.) In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried."

(Section 1141, Penal Code.)

It is obvious from the record that the juror Furner did not die nor did he become ill within the language of Section 1089 of the Penal Code. Furthermore, since the trial judge stated that in dismissing the juror Furner, the judge was acting in his own discretion, it is obvious that the juror Furner did not request his

discharge within the language of Section 1089 of the Penal Code.

The inapplication of Sections 1139 and 1141 of the California Penal Code are made apparent in the decision of *People v. Young,* 100 Cal. App. 18, at page 20 (279 Pac. 824, 825), where the Court specifically held that these sections did not apply in that particular case. In the first place it is the contention of these petitioners that there was less cause for the discharge of juror Furner than there was for the discharge of the juror Zillgitt in the *Young* case. Secondly, by their very language these last two sections of the Penal Code specifically refer to a situation which arises "after the retirement of the jury".

Obviously, therefore, there was no legislative authority for the action of the trial judge in dismissing the juror Furner, and thus discharging the "Furner jury". Moreover, it is the rule of the California courts that the qualifications of jurors are subject to legislative control; that the Legislature has occupied this field; and that the action of any trial judge discharging a juror, unless that discharge is upon some legislative ground, is illegal.

While the Legislature would be powerless to impinge upon the common law right of trial by jury, insofar as qualifications of jurors are concerned, the Legislature has the undoubted right to determine their qualifications.

This was made plain in *In re Mana,* 178 Cal. 213, 172 Pac. 986 (1918) where the Court, passing on the

right of the Legislature to permit women to serve on juries, held as follows:

> "First, that constitutional provisions guaranteeing the right to a trial by jury establish the right to a trial by a jury as known at common law; second, that the qualifications of the jury is a matter subject to legislative control, and that even though such qualifications may differ from those at common law, such legislation is nevertheless a valid exercise of legislative power." (*In re Mana,* 178 Cal. 213, 214, 172 Pac. 986 (1918.)

To the same effect, in *People v. Chin Mook Sow,* 51 Cal. 597, where the Court said, at page 599:

> "The statute determines the qualification of jurors, and prescribes the mode of drawing and impaneling them; aliens are expressly prohibited from serving in that capacity. (Code Civ. Proc. sec. 198.)."

In the well known case of *People v. Schmitz,* 7 Cal. App. 330, 94 Pac. 407 (1908) (quoted at length in the *Young* case), the Court allowed the prosecution to direct peremptory challenges against certain jurors who had been passed for cause and sworn to try the case.

While the question of double jeopardy was not involved, the legality of the action of the trial judge was challenged and subsequently condemned by the District Court of Appeal in reversing the conviction of the defendant. It appears that after a juror named Bray had been examined, passed and sworn to try the case, it was published in the press that Bray was related to the defendant Schmitz.

At the next session of the Court the prosecuting attorney raised the point and Bray was interrogated on the subject. He denied blood relationship with Schmitz although admitting that his wife might be distantly related. The evidence, however, entirely failed to show any relationship by consanguinity or affinity within the fourth degree. In fact it did not show any relationship of the juror to the defendant in any degree or to any extent whatsoever.

The trial judge, in ruling upon the challenge said, and we quote from page 350 (94 Pac. 407, 412) of the decision: "I think any relationship, no matter how remote, ought to keep a person off the jury."

In condemning the action of the trial judge in making his personal opinion a test for the qualification of an otherwise qualified juror, the Appellate Court used the following language:

> *"It was not for the judge to set up his judgment against the statute as to the qualifications of a juror."* (Emphasis added.) (*People v. Schmitz,* 7 Cal. App. 330, 350; 94 Pac. 407, 412 (1908).

The situation in the *Schmitz* case, so far as the opinion of the trial judge was concerned, is precisely the same as the situation in this case, on the particular point involved here.

The learned trial judge in the instant case took it upon himself, in the exercise of his "discretion", to excuse the juror Furner "for cause" although there is no such provision for any such action in our statutes which regulate the qualifications of jurors.

This is not a case where some manifest necessity for excusing a juror was present. Furner was not ill, either mentally or physically.

There is nothing in the record to show that any of Furner's faculties were impaired. He was neither corrupt nor biased nor prejudiced. It is not claimed that he lied on his *voir dire*. He was not disqualified in any way, according to law, from serving as a juror.

So far as the record shows Furner met every requirement of the code for jury service.

Section 199 of the Code of Civil Procedure of California provides that any person convicted of a felony shall be disqualified from serving on a jury. Section 1072 of the Penal Code of the State of California provides that such conviction is a general cause for challenge. No such disqualification attaches to a person who is merely accused of crime. Had the Legislature intended that a person accused of crime should be excused from jury service it would have enacted laws to that effect.

It was not for the trial judge in this case to set his opinion up against the judgment of the Legislature which is charged with the duty and responsibility of determining the qualifications of jurors. Therefore the removal of Furner was unlawful. Being so, the jury which had been duly sworn to try the case was illegally dismissed, thus resulting in the acquittal of appellants, in the eyes of the law. All subsequent proceedings were in excess of the jurisdiction of the Court.

Furthermore, it is submitted that this gross error of the trial Court was committed without knowledge that it was being done, for it is clear from the language of the trial judge at page 145 of the typewritten record, that the trial Court recognized that the removal of the juror Furner was an illegal act but did not believe that jeopardy had yet attached, for the Court at that time, in denying petitioners' plea that they were denied their federal constitutional rights, made an issue of the fact that no witness had been sworn. As said before, jeopardy attaches in California immediately upon the impanelment and swearing of the jury and does not depend on the swearing of any witness.

Finally, the error of the trial Court is admitted in the decision and opinion of the District Court of Appeal when that Court attempts to evade the natural consequences of this gross error, but admits at page 945 of the typewritten record "It must be admitted that the circumstances of the substitution of Bailey for Furner were not within the purview of Section 1089". (Penal Code of California.) Again, that Honorable Court stated at page 949 of the typewritten record "If this is true where the substitution has been made in the manner provided by Penal Code Section 1089 it must be true where it has been made in an irregular manner." (That is to say, in the irregular manner in which the juror Furner, and the "Furner jury" were discharged.)

Therefore, even the trial judge and the District Court of Appeal admit that the juror Furner was

discharged for a reason not found in the statutes of the State of California. Thus the "Furner jury" was discharged without legal cause, and upon their trial by the successor jury these petitioners were placed twice in jeopardy for the same offense, for, as seen before, it is the rule of California that only the Legislature has authority to decree the causes for which a juror and a jury may be discharged. The jury had been impaneled and sworn at the time of Furner's discharge and, within the rules announced in *People v. Young*, 100 Cal. 18, 279 Pac. 824 (1927), and *Jackson v. Superior Court*, 10 Cal. (2d) 350, 74 Pac. (2d) 243 (1937), these defendants were thereupon in jeopardy. Their subsequent trial placed them twice in jeopardy for the same offense.

CONCLUSION.

We believe that the foregoing conclusively demonstrates that these petitioners were placed twice in jeopardy for the same offense, that the action of the trial Court in so jeopardizing the petitioners, and thus denying them their constitutional rights, and the action of the District Court of Appeal in affirming the conduct of the trial Court, and the action of the Supreme Court of the State of California in refusing to consider the question of petitioners' constitutional rights, constituted a denial to petitioners of due process of law and equal protection of the laws as is their right under the 14th Amendment to the Constitution of the United States.

To deny an accused the principle of double jeopardy, is to sanction a system of law, or absence of law, wherein any accused, no matter how innocent, could be harassed through the criminal courts for the remainder of his days. If the right to be free from such prosecution is not a principle of liberty and justice, within the meaning of the 14th Amendment, then, it is respectfully submitted, the phrase "principle of liberty and justice" is purely a figment of legal imagination.

Wherefore, your petitioners respectfully submit that a writ of certiorari should issue out of this Honorable Court to the District Court of Appeal, First Appellate District, State of California, as petitioned.

Dated, San Francisco, California,
August 9, 1948.

Respectfully submitted,
SIMEON E. SHEFFEY,
Attorney for Petitioners.

WALTER MCGOVERN,
JOHN R. GOLDEN,
Of Counsel.

(Appendix Follows.)

Appendix

(1)

1 Criminal No. 2452

In the

District Court of Appeal

State of California

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

INEZ L. BURNS, MABEL SPAULDING, MYRTLE RAMSAY, JOSEFH HOFF and MUSETTE BRIGGS,
Defendants and Appellants.

APPELLANTS' OPENING BRIEF.

Appeal from the Judgment of the Superior Court of the State of California, in and for the City and County of San Francisco.

Honorable Edward P. Murphy, Judge.

(2)

To the Honorable John T. Nourse, Presiding Justice, and to the Honorable Associate Justices of the District Court of Appeal of the State of California, in and for the First Appellate District, Division Two:

Appellants appeal from a judgment of conviction. They elect to rely solely, in this appeal, on their contention that the trial Court deprived them of their constitutional rights not to be placed in jeopardy twice for the same offense. They seek no relief merely because of errors of procedure, but, invoking the shield of the Constitution they pray this Honorable Court to set them free here and now.

Inez L. Burns, Mabel Spaulding, Myrtle Ramsay, Joseph Hoff and Musette Briggs were informed against by the District Attorney of San Francisco on December 17, 1945, in the matter of "The People of the State of California against Inez L. Burns, alias Inez L. Brown, Mabel Spaulding, Myrtle Ramsay, Joseph Hoff, and Musette Briggs," being Criminal Action No. 37,928 in the Superior Court of the State of California, in and for the City and County of San Francisco, of the crime of felony, to-wit: "Violation of Section 182 of the Penal Code, conspiracy to commit abortion, and to violate Section 2141 of the Business and Professions Code."

After their arraignment and plea of not guilty the appellants were tried by a jury before Honorable

William F. Traverso, Judge of said Superior Court, which jury disagreed. Subsequently the appellants (3) were again tried by another jury before Honorable Herbert C. Kaufman, Judge of said Superior Court. That jury also disagreed.

(6)

Appellants objected to all of such contemplated proceedings, as outlined by the Court, stating that they were ready to proceed to trial—that there was no provision of law whereby the action contemplated by the Court could be carried out legally—that mere accusation of a crime is not in and of itself sufficient reason to justify the Court in taking such action—that accusation of a crime is not, in itself, sufficient grounds for a challenge for cause, and that if such contemplated proceedings were followed it would be a denial to all defendants of their constitutional rights, including the federal guarantee of equal protection (7) of the laws and of their right under the Constitution of California, whereby no defendant may be placed in jeopardy twice for the same offense.

(50)

Appellants had the right to have the jury impaneled according to the laws of the State of California.

It was not for the trial Court to set up its judgment against the statute as to the qualifications of a juror.

The trial judge did not have the right to arbitrarily dismiss a qualified juror unless it could be done for

cause as provided by the code. The qualifications of jurors is a matter subject to legislative control.

The conclusion is unavoidable that a miscarriage of justice of a very serious nature and affecting the constitutional rights of the appellants was committed by arbitrarily removing the juror Furner and putting another person in his place.

Appellants were denied due process of law and the equal protection of the laws and their rights not to be tried twice for the same offense in violation of the federal and state constitutions.

It has long been emphasized that while the great legal minds of our country have sometimes differed on the correct interpretation to be given to various provisions of our organic laws, both federal and state, and that such differences of opinion occasionally led to public and legislative debate as to their wisdom and propriety, no responsible authority has challenged the soundness of the wise and beneficent principle that no person shall be twice put in jeopardy for the same offense.

This important birthright of our people is fortified in those charters of our liberties, federal and state, against the power of attack. It has been well (51) said that if ideas can be expressed in words and if language has any meanings, then our organic law contemplates that this valuable right of all persons subject to the jurisdiction of American courts, is to be preserved inviolate without impediment and without restriction.

1 Criminal No. 2452

In the

District Court of Appeal

State of California

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

INEZ L. BURNS, MABEL SPAULDING, MYRTLE RAMSAY, JOSEFH HOFF and MUSETTE BRIGGS,
Defendants and Appellants.

APPELLANTS' CLOSING BRIEF.

Respondent has so accumulated its brief that any attempt to reply thereto in sequence would necessarily involve repetitions and disorder.

We have attempted to arrange our reply to respondent's various claims and contentions in such order, however, that the same may be made as clear to the Court as circumstances will permit.

(5)

Respondent's further claims that appellants are obviously guilty because they were convicted by "a" jury, and by "the very jury that had been sworn to determine the cause", is begging the question.

It is true that twelve persons improperly designated as a jury returned what was termed a verdict against these defendants. The fact is, however, that this so-called verdict was null and void because of the illegal removal of the duly qualified and sworn juror Furner—that because the jury was destroyed when Furner was removed the appellants were thereby then and there acquitted.

Appellants' subsequent conviction by "a" jury was a nullity because that so-called jury was a dead limb on the judicial tree. That so-called jury had no power to render a verdict. In the absence of Furner it certainly was *not* "the very jury that had been sworn to determine the cause."

Certainly it can not help this Court to determine what the Court has heretofore found to be a debatable question by arguing speciously, as respondent does, that "a" jury found the defendants guilty.

Respondent repeats in various intemperate phrases that appellants' position is: "We wanted Furner." Of course we would have made the same objections on the same grounds had the Court, under similar circumstances, illegally removed any other juror. All we wanted was due process of law—to be in jeopardy only *once*—to be tried by the only valid jury that was

sworn to try the case. We offer no apologies for seeking the protection of the Constitution.

(7)

Respondent's claim that there was only one trial does not affect our position. The first trial ended when Furner was removed and the appellants, in legal effect, were acquitted. What happened thereafter is beside the point. Call it a trial or what you will, it did violence to our State Constitution and to the long settled law in California, and such grievous error should not be upheld and thus become part of the established practice of this State.

Respondent presents the novel contention that no "substantial prejudice" has been shown by appellants in the removal of Furner. This apparently means that whenever the issue of double jeopardy is raised the accused must show "substantial prejudice," otherwise he may be denied due process of law and be tried times without number for the same offense.

In the same vein respondent also argues that "The personnel of the jury was not changed to the prejudice of defendants and in the interest of the prosecution". To state this contention of respondent is to answer it. If respondent's argument is sound we no longer have a Bill of Rights in California. A man can be denied a jury trial, over his protest, and if the record shows he is probably guilty there will be no "prejudice" in the denial of his constitutional rights.